New Zealand Law Society
Te Kāhui Ture o Aotearoa

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Rt Hon Adrian Rurawhe
Chairperson
Standing Orders Committee

Re: Review of Standing Orders 2023 – proposals for entrenchment

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to make a submission on the Standing Orders Committee's review of the rules and principles relating to proposals for entrenchment.

1.2 This submission has been prepared by the Law Society's Public and Administrative Law Committee and Rule of Law Committee.[1] It recommends making various amendments to the Standing Orders to:

(a) Restrict the use of entrenchment, so that it may be used only for a necessary constitutional purpose;

(b) Clarify at what stage in the passage of legislation a qualified majority is needed for an entrenched provision to be 'passed';

(c) Clarify that a simple majority of votes is required, except for a proposal for an entrenched provision;

(d) Require a proposal for entrenchment to be referred to and reported on by a select committee;

(e) Clarify that entrenchment proposals cannot be introduced as an amendment to a bill at the committee of the whole House (**CWH**) stage; and

(f) Provide that any entrenchment proposals introduced at the CWH stage can be ruled 'out of order' by the Speaker.

1.3 This submission focusses only on entrenchment provisions, and changes needed to the Standing Orders to provide for the proper consideration and passing of such provisions. It does not address other changes or improvements to the Standing Orders.[2]

1.4 The Law Society wishes to be heard in relation to this submission.

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1 More information about these Committees can be found on the Law Society's website.

2 Other changes and improvements to the Standing Orders are discussed in the Law Society's submission on the initial consultation undertaken by the Standing Orders Committee in 2022. A copy of this submission is available here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/SOC-Standing-Orders-review-2023.pdf.

2 Principles which should inform any changes to the Standing Orders

2.1 The Standing Orders Committee has sought input on any conventions, principles, or cases that may be relevant to the Committee's consideration of how the House should approach proposals for entrenchment.

Forms of entrenchment

2.2 Entrenchment rules typically allow for the following types of constraints to be placed:[3]

(a) limitations through which amendments to the law must be expressed;

(b) limitations that require the institution to spend additional time considering the change; and

(c) limitations that serve to expand the group who must agree to the change.

2.3 The first form of entrenchment, referred to in paragraph 2.2(a) above, is perhaps the most limited form of entrenchment, and requires a measure to amend the law to be expressed in a certain way. This means the legislature can alter the law but must do so through a prescribed form. This may simply require the new rule to explicitly repeal the old, or require a prescribed form of words to effect the alteration.

2.4 The second form of entrenchment referred to above requires a longer period to be spent deliberating an amendment. This form of entrenchment seeks to slow down the process of legal change in a given area by:

(a) Determining that a set period of time must elapse between initial consideration of a measure and a final vote on the proposal; or

(b) Requiring the relevant body to consult with other institutions before reaching a decision about amending the law.

2.5 The third form of entrenchment expands the group required to vote for a measure, either by requiring a supermajority of those entitled to vote, or by requiring a specified level of support from sections of that institution or from another constitutional (or other) body. The reserved provisions of the Electoral Act 1993 fall into this latter category, requiring that a proposal for amendment or repeal be passed by a majority of 75% of all members of the House, or be carried by a majority of the valid votes cast at a poll of electors in the General and Māori electoral districts.[4]

When is entrenchment appropriate?

2.6 There is a need to protect the legitimate sphere of constitutional entrenchment against political opportunism. The public law text *Joseph on Constitutional and Administrative Law*

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3 NW Barber "Why Entrench?" (2016) 14(2) ICON at 325-350.

4 Electoral Act 1993, section 268.

notes "*[a] government, through genuine (if misguided) belief in its policies, might resort to manner and form [that is, entrenchment] as insurance against future repeal of its laws*."[5]

2.7 There are two broad arguments against the use of entrenchment:

(a) First, entrenchment makes it excessively hard to change the law. It is then difficult for institutions to respond to the needs and wishes of citizens, and to hold lawmakers accountable for their decisions.

(b) Second, entrenchment can create friction between institutions within a constitution (or constitutional arrangements) by enabling one institution to limit another, or by encouraging institutions to circumvent these limits.[6]

2.8 The Standing Orders are the rules that enable the House to fulfil its constitutional role and allow the process of legislative change in a way that is neither too hard, nor too easy. The default rules that apply to passing or amending legislation have been chosen for good reason. Having adopted a particular set of rules, any departure from those rules must then be justified. Entrenchment proposals, in particular, must be justified because they add an additional burden to the process of legal change specified by the default rules. That burden must be imposed for a good reason.

2.9 A distinction must be drawn between constitutional process and government policy, recognising such a distinction is not always self-evident, and constitutional matters can be politically contestable.[7] Entrenchment is legitimate where used to safeguard the integrity of representative democracy, but not where it is employed to protect contestable government policies against repeal by a future Government. Standing Order 140, setting out the default rule for voting on Bills, inveighs against one generation seeking to control subsequent generations. Entrenching substantive government policy imposes legislative policy restraints in the future, which is contrary to the public interest. Entrenchment must be confined to constitutional matters and serve a necessary constitutional purpose.

2.10 Constitutions routinely adopt entrenchment procedures to protect the democratic structure of government. Typical subjects of entrenchment include the separate branches of government, the electoral system,[8] the independence of the courts, and Bills of Rights.[9]

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5 Philip Austin Joseph, *Joseph on Constitutional and Administrative Law* (5th ed, Wellington, 2021) at [17.8.4]. The term "manner and form" is synonymous for entrenchment, denoting special procedures of law-making. The term "manner and form" derives from the original words of section 5 of the Colonial Laws Validity Act 1865 (Imp). See *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 (HCA); [1932] AC 526 (PC).

6 Above n 3, at 342-3.

7 For example, prisoner voting rights are a constitutional but politically contested issue.

8 See the Electoral Act 1993, s 268 for the entrenchment of key features of our electoral system. Section 268 is the only instance of constitutional entrenchment under New Zealand law.

9 The original White Paper Bill of Rights was intended as an entrenched, supreme law instrument. See A White Paper *A Bill of Rights for New Zealand* (Government Printer, Wellington, 1985). The White Paper was tabled in the House of Representatives in 1985 but the New Zealand Bill of Rights Act 1990 which emerged from that initiative is a parliamentary bill of rights that is not entrenched.

Further subjects of entrenchment might include national symbols, such as the flag, the national anthem, and national emblems such as the New Zealand Coat of Arms.[10]

2.11 In the Law Society's view, the recent proposal to entrench public ownership of water infrastructure via the *Water Services Entities Bill* was an example of entrenchment being used in a constitutionally objectionable manner. The Bill proposed entrenching a matter of contested government policy, and which lacked obvious widespread public acceptance. Such matters should remain, in the public interest, able to be amended or repealed through the ordinary democratic political contest and normal legislative process.

2.12 It may be that the Committee will come to consider whether it is existing constitutional convention that entrenchment be used only to safeguard the democratic structure of government.

2.13 In the leading decision on the identification of constitutional convention, the Court observed: "*The essential condition for [the] recognition [of a convention] must be that the parties concerned regarded it as binding on them [and] it must play as well a necessary constitutional role*."[11] A rule that confined entrenchment to the protection of constitutional process or representative democracy would play a necessary constitutional role. However, given the events of the *Water Services Entities Bill*, it could not be said that such a rule engenders widespread acceptance by the political actors that there is an obligation to abide such a rule. That entrenchment proposal was moved by amendment and successfully carried at Committee-of-the-Whole (CWH) stage. The matter was only revisited in the face of widespread opposition from public lawyers.

2.14 Alternatively, it might be argued that the Government's removal of the entrenchment proposal – following the widespread criticism – amounted to a rule-constituent precedent that gave birth to a constitutional convention. The Government appears to have accepted it would be constitutionally inappropriate to have proceeded with the proposal. Such rule-constituent precedents have, from time to time, given rise to constitutional conventions binding on those to whom they apply. However, whether that is so here, there is no dispute that, in principle, entrenchment should never be used to safeguard against future repeal of a government's political policies. Political policies are, by definition, contestable and must always be amenable in the public interest to alteration by simple majority vote in Parliament. The default voting rule in SO 140 ("[q]uestions are determined by a majority of votes Aye or No") speaks to that need in simple and direct language.

Recommendation

2.15 The Law Society suggests the Standing Orders should recognise that the basis of entrenchment in New Zealand has been founded on constitutional purposes, and to protect against governments seeking to bind future generations on contestable policy matters. We recommend Standing Order 270 be amended to reflect the current practice in New Zealand by adding the following new sub-clause (or a clause to this effect):

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10 Above, n 5, at [17.8.4].

11 *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1 (SCC) at 114.

(3) No proposal for entrenchment may be made in a Bill introduced in the House, or adopted at any stage during a Bill's passage, that does not serve a necessary constitutional purpose.

3 Clarifying the relevant procedural requirements

3.1 Standing Order 270 provides that any proposal for entrenchment must itself be carried in a CWH by the majority it would require for the amendment or repeal of the provision that is to be entrenched. The Law Society supports the qualified majority requirement in SO 270. However, it is difficult to determine how the voting requirement in SO 270 is to be applied at the CWH stage, when read alongside the general voting requirements,[12] and any statutory requirement for a proposal to amend or repeal entrenched provisions to be *passed* by a qualified majority.

3.2 Standing Order 270 requires that any proposal for entrenchment must itself be *carried* in a CWH by the majority that it would require for the amendment or repeal of the provision that is to be entrenched. However, statutes which seek to entrench certain provisions generally require proposals to amendment or repeal those entrenched provisions to be 'passed' by a qualified majority. For example, section 268 of the Electoral Act requires a proposal for amendment or repeal of the reserved provisions to be "*passed* by a majority of 75% of all members of the House of Representatives" (emphasis added). Similarly, Supplementary Order Paper No 285 to the Water Services Entities Bill (now Act) provided that the entrenched provisions in that enactment could not be repealed or amended unless the proposal for the amendment or repeal is "*passed* by a majority of 60% of all the members of the House of Representatives" (emphasis added).[13]

3.3 We note that SO 273 requires a bill to be read three times by order of the House to be 'passed' by the House. This action of reading the Bill occurs when the title is read by the Clerk at the Table following the vote at the first, second and third readings. It then follows that a bill cannot be 'passed' at the CWH stage, and the terminology that is generally used in legislation is inconsistent with the terminology and the legislative procedures set out in the Standing Orders.

3.4 The significance of an entrenchment proposal is lost when the only procedure specified in the Standing Orders applies solely at the CWH stage, and the terminology is not well-aligned. This approach is not consistent with international practice, where there are clear procedural requirements usually specified in a state's Constitution. For example, the Australian Constitution states:[14]

> "[any proposal to amend the Constitution] must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses, the proposed law must be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives".

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12 SO 140.

13 Clause 206AA(2)(a) of Supplementary Order Paper No 285.

14 Constitution of Australia, article 128.

3.5 If, in accordance with article 128 of the Australian Constitution, an absolute majority of the House does not agree to the third reading of a bill which proposes an alteration of the Constitution, the bill must be laid aside immediately and may not be revived during the same session of Parliament.[15]

3.6 The Standing Orders of the General Assembly of Northern Ireland state that decisions of the Assembly are to be taken by a simple majority of votes.[16] However, certain decisions require "cross community support", which reflects a majority of voting in designated nationalist and unionist groups, or a majority of 60%.[17] The Standing Orders and the relevant legislation therefore have a clear link, and a cross-refence in the voting rules, to the circumstances where a qualified majority is required.

3.7 In contrast, SO 140 of New Zealand's Standing Orders simply set out the general and default rules for voting, and state that questions are to be determined by a majority of votes Aye or No.[18] SO 140 does not contain a provision for a qualified majority under an entrenched provision, nor does it contain any reference to SO 270 or the special procedures of law-making set out in section 268 of the Electoral Act. The default voting rules and the entrenchment rules are therefore not well-aligned with the legislative requirement for a proposal or amendment to be passed by a specified majority of all members of the House.

Recommendation

3.8 The Standing Orders could be improved by providing for the processes and procedures for 'passing' entrenchment provisions. The Law Society recommends:

(a) Amending SO 270 to clarify at what stage in the passage of legislation a qualified majority is needed for an entrenched provision to be 'passed'; and

(b) Amending SO 140 to clarify that a simple majority of votes is required, except for a proposal for an entrenched provision.

4 Setting the level of qualified majority

4.1 The Standing Orders Committee has invited feedback on whether the Standing Orders should prevent the proposal of any required majority of the House other than 75% of all members. The Law Society considers that any level of qualified majority should be informed by:

(a) The constitutional nature of the provision and any reasons as to why there is a need to entrench that provision; and

(b) Careful consideration of whether it would be too difficult, or too easy, to achieve the majority required to make changes in future.

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15 Standing Orders of the House of Representatives (Australia), SO 173; Standing Orders of the Senate (Australia), SO 135.

16 Standing Orders of the General Assembly of Northern Ireland, SO 26.

17 Above n 16; Northern Ireland Act 1998, sections 4(5) and 41.

18 SO 140.

4.2 These are substantive policy matters (and not procedural matters) which are more appropriately addressed in legislation, rather than the Standing Orders.

5 Considering entrenchment provisions under urgency

5.1 The Law Society considers it is not appropriate to consider proposals for entrenchment under urgency. A proposal for entrenchment should only seek to serve a constitutional purpose – such proposals should not be rushed, and should be the subject of considered debate and engagement with the public, including through the select committee process.

5.2 As discussed above, one form of entrenchment is that of *time*, and there is an expectation that the House spends a longer period of time deliberating a proposal for entrenchment. This form of entrenchment has been used in some countries in the Pacific region, which require a qualified vote at two stages of the passing of a bill, and a pause in between the votes, in order to amend the Constitution.

5.3 For example, the process for amending the Constitution of Samoa requires the support of no less than two-thirds of the total number of members of Parliament at the second and third readings of the bill, and a 90 day interval between the two readings.[19] In Fiji, the procedure for a bill amending the Constitution requires the support of at least three-quarters of the members of Parliament at the second and third readings, an interval of 30 days between the readings, and that the relevant parliamentary committee report on the Bill to Parliament.[20] The Constitution of the Cook Islands requires any amendment to the Constitution to be passed by two-thirds of the total parliamentary membership at the final vote and the vote preceding the final vote, and requires an interval of at least 90 days between the two votes.[21] In addition, the Standing Orders of the of the Parliament of the Cook Islands require constitutional amendment bills to be referred to and reported on by a parliamentary committee.[22]

5.4 The Law Society supports the introduction of similar requirements which would allow for proper consideration and reflection on changes to constitutional measures. We do not consider urgency to be an appropriate procedure for the passing of an entrenched provision.

Recommendation

5.5 The Law Society recommends amending the Standing Orders to require a proposal for entrenchment to be referred to, and reported on by, a select committee.

6 Amendments made at the CWH stage

6.1 Similarly, it is not appropriate to introduce proposals for entrenchment at the CWH stage, as this will not allow for sufficient engagement with the public or with interested parties, as would happen during the select committee process. Proposals for entrenchment should be

19 The Constitution of the Independent State of Samoa, article 109.
20 Constitution of the Republic of Fiji, article 160.
21 The Constitution of the Cook Islands, article 41.
22 Standing Orders of the Parliament of the Cook Islands, SO 208.

considered against the wider context of the bill as introduced, and through the full select committee process and second reading debates.

Recommendation

6.2 We recommend amending the Standing Orders to clarify that:

(a) Entrenchment proposals cannot be introduced as an amendment to a bill at the CWH stage; and

(b) Any entrenchment proposals introduced at the CWH stage can be ruled 'out of order' by the Speaker.

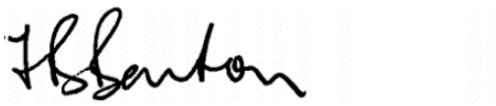
6.3 If this recommendation is not accepted, and a proposal for entrenchment is introduced and passed with the necessary majority at the CWH, then the progress of the Bill should be halted while the entrenchment provisions are referred back to a select committee for consideration. The select committee could then invite submissions on the entrenchment proposals and report back to the House within a fixed time (for example, 90 days). That would then give the House the opportunity to:

(a) proceed with the Bill (particularly if the select committee recommends that the entrenched provisions be passed); or

(b) recommit the Bill and amend the entrenchment provisions (if amendments are necessary); or

(c) remove the entrenchment provisions from the Bill.

Nāku noa, nā



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